

Wiretapping, Tape Recorders, and Legal Ethics: An Overview of Questions Posed by Attorney Involvement in Secretly Recording Conversation

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Summary

In some jurisdictions, it is unethical for an attorney to secretly record a conversation even though it is not illegal to do so. A few states require the consent of all parties to a conversation before it may be recorded. Recording without mutual consent is both illegal and unethical in those jurisdictions. Elsewhere the matter is more uncertain.

In 1974, the American Bar Association (ABA) opined that surreptitiously recording a conversation without the knowledge or consent of all of the participants violated the ethical prohibition against engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation.” The ABA conceded, however, that law enforcement recording, conducted under judicial supervision, might breach no ethical standard. Reaction among the authorities responsible for regulation of the practice of law in the various states was mixed. In 2001, the ABA reversed its earlier opinion and announced that it no longer considered one-party consent recording per se unethical when it is otherwise lawful.

Today, this is the view of a majority of the jurisdictions on record. A substantial number, however, disagree. An even greater number have yet announce to an opinion.

A sampling of the views of various bar associations in the question is attached. An earlier version of this report once appeared under the same title as CRS Report 98-250. An abridged version of this report is available without footnotes or attachment as CRS Report R42649, *Wiretapping, Tape Recorders, and Legal Ethics: An Abridged Overview of Questions Posed by Attorney Involvement in Secretly Recording Conversation*.

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Introduction

Has an attorney engaged in unethical conduct when he or she secretly records a conversation? The practice is unquestionably unethical when it is done illegally; its status is more uncertain when it is done legally. The issue is complicated by the fact that the American Bar Association (ABA), whose model ethical standards have been adopted in every jurisdiction in one form or another, initially declared surreptitious recording unethical per se and then reversed its position. Moreover, more than a few jurisdictions have either yet to express themselves on the issue or have not done so for several decades. A majority of the jurisdictions on record have rejected the proposition that secret recording of a conversation is per se unethical even when not illegal. A number endorse a contrary view, however, and an even greater number have yet to announce their position.

Background

Federal and state law have long outlawed recording the conversation of another.¹ Most jurisdictions permit recording with the consent of one party to the discussion, although a few require the consent of all parties to the conversation.²

Both the ABA's Code of Professional Responsibility (DR 1-102(A)(3)) and its successor, the Model Rules of Professional Conduct (Rule 8.4(b)), broadly condemn illegal conduct as unethical. They also censure attorney conduct that involves "dishonesty, fraud, deceit or misrepresentation."³ In 1974, the ABA concluded in *Formal Opinion 337* that the rule covering dishonesty, fraud, and the like "clearly encompasses the making of recordings without the consent of all parties." Thus, "no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." The *Opinion* admitted the possibility that law enforcement officials operating within "strictly statutory limitations" might qualify for an exception.

Reaction to the *Opinion 337* was mixed. The view expressed by the Texas Professional Ethics Committee was typical of the states that follow the ABA approach:

In February 1978, this Committee addressed the issue of whether an attorney in the course of his or her practice of law, could electronically record a telephone conversation without first informing all of the parties involved. The Committee concluded that, although the recording of a telephone conversation by a party thereto did not per se violate the law, attorneys were held to a higher standard. The Committee reasoned that the secret recording of conversations offended most persons' concept of honor and fair play. Therefore, attorneys should not electronically record a conversation without first informing that party that the conversation was being recorded.

The only exceptions considered at that time were "extraordinary circumstances with which the state attorney general or local government or law enforcement attorneys or officers acting under the direction of a state attorney general or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations

¹ Since the passage of the Omnibus Crime Control and Safe Streets Act in 1968, an increasing number of states have looked to the federal statute when drafting their statutes in the area; see generally CRS Report R41733, *Privacy: An Overview of the Electronic Communications Privacy Act*.

² *Id.* at 49 (Appendix B: Consent Interceptions Under State Law).

³ ABA RULES OF PROFESSIONAL CONDUCT, Rule 8.4(c); ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 1-102(A)(4).

conforming to constitutional requirements,” which exceptions were to be considered on a case by case basis.

... [T]his Committee sees no reason to change its former opinion. Pursuant to Rule 8.04(a)(3), attorneys may not electronically record a conversation with another party without first informing that party that the conversation is being recorded. *Supreme Court of Texas Professional Ethics Committee Opinion No. 514* (1996).⁴

A second group of states—Arizona, Idaho, Kansas, Kentucky, Minnesota, Ohio, South Carolina, and Tennessee—concurred but with an expanded list of exceptions, for example, permitting recording by law enforcement personnel generally not just when judicially supervised;⁵ or recording by criminal defense counsel;⁶ or recording statements that themselves constitute crimes such as bribery offers or threats;⁷ or recording confidential conversations with clients;⁸ or recordings made solely for the purpose of creating a memorandum for the files;⁹ or recording by a government attorney in connection with a civil matter;¹⁰ or recording under other extraordinary circumstances.¹¹

A third group of jurisdictions refused to adopt the ABA unethical per se approach. In one form or another the District of Columbia, Mississippi, New Mexico, North Carolina, Oklahoma, Oregon, Utah, and Wisconsin suggested that the propriety of an attorney surreptitiously recording his or her conversations where it was otherwise lawful to do so depended upon the other circumstances involved in a particular case.¹²

⁴ The states that appeared to share this view included Alabama, Alaska, Colorado, Hawaii, Iowa, Missouri, and Virginia. *Alabama Bar Association Opinion 1983-183* (1984); *Alaska Bar Association Ethics Committee Ethics Opinions No. 92-2* (1992) and *No. 91-4* (1991); *People v. Smith*, 778 P.2d 685, 686, 687 (Colo.1989); *Hawaii Formal Opinion No. 30* (1988); *Iowa State Bar Association v. Mollman*, 488 N.W.2d 168, 169-70, 171-72 (Iowa 1992); *Missouri Supreme Court Advisory Committee Opinion Misc. 30* (1978); *Virginia State Bar Association Legal Ethics Opinions 1635* (1995) and *1324*; *Gunter v. Virginia State Bar*, 238 Va. 617, 621-22, 385 S.E.2d 597, 600 (1989).

⁵ *State Bar of Arizona Committee on the Rules of Professional Responsibility Opinion No. 95-03* (1995); *Kentucky Bar Association Ethics Opinion KBA E-279* (1984); *Minnesota Lawyers Professional Responsibility Board Opinion No. 18* (1996); *Ohio Board of Commissioners on Grievances & Discipline Opinion No. 97-3* (1997); *South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 92-17* (1992); *Tennessee Board Professional Responsibility Formal Ethics Opinion No. 86- F-14(a)*(1986).

⁶ *State Bar of Arizona Committee on the Rules of Professional Responsibility Opinion No. 95-03* (1995); *Kentucky Bar Association Ethics Opinion KBA E-279* (1984); *Minnesota Lawyers Professional Responsibility Board Opinion No. 18* (1996); *Ohio Board of Commissioners on Grievances & Discipline Opinion No. 97-3* (1997); *Tennessee Board Professional Responsibility Formal Ethics Opinion No. 86- F-14(a)*(1986).

⁷ *State Bar of Arizona Committee on the Rules of Professional Responsibility Opinion No. 95-03* (1995); *Tennessee Board Professional Responsibility Formal Ethics Opinion No. 86- F-14(a)*(1986).

⁸ *Idaho State Bar Committee on Ethics and Professional Responsibility Formal Opinion 130* (1989); *Minnesota Lawyers Professional Responsibility Board Opinion No. 18* (1996).

⁹ *Kansas Bar Association Opinion 96-9* (1997).

¹⁰ *Minnesota Lawyers Professional Responsibility Board Opinion No. 18* (1996).

¹¹ *Ohio Board of Commissioners on Grievances & Discipline Opinion No. 97-3* (1997).

¹² D.C. Opinion No. 229 (1992) (recording was not unethical because it occurred under circumstances in which the uninformed party should have anticipated that the conversation would be recorded or otherwise memorialized); *Mississippi Bar v. Attorney ST.*, 621 So.2d 229 (Miss. 1993)(context of the circumstances test); NM Opinion 1996-2 (1996)(members of the bar are advised that there are no clear guidelines and that the prudent attorney avoids surreptitious recording); N.C. RPC 171 (1994)(lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded); Oklahoma Bar Association Opinion 307 (1994)(a lawyer may secretly record his or her conversations without the knowledge or consent of other parties to the conversation unless the recording is unlawful or in violation of some ethical standard involving more than simply recording); Ore. State Bar Ass’n Formal

In 2001, the ABA issued *Formal Opinion 01-422* and rejected *Opinion 337*'s broad proscription. Instead, *Formal Opinion 01-422* concluded that:

1. Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.
2. Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rule 8.4, and if the purpose of the recording is to obtain evidence, also may violate Model Rule 4.4.
3. A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.
4. Although the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable.

Current Status

Where Recording Is Illegal Without All Party Consent

There seems to be no dispute that where it is illegal to record a conversation without the consent of all of the participants, it is unethical as well. Recording requires the consent of all parties in 10 states: California, Florida, Illinois, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington.¹³

Lawful but Unethical

Only two states, Colorado and South Carolina, have expressly rejected the approach of the ABA's *Formal Opinion 01-422* since its release.¹⁴ Yet a number of other states have yet to withdraw earlier opinions that declared surreptitious records ethically suspect: Arizona, Idaho, Indiana, Iowa, Kansas, and Kentucky.¹⁵

Opinion No. 1991-74 (1991) (an attorney with one party consent may record a telephone conversation "in absence of conduct which would reasonably lead an individual to believe that no recording would be made"); Utah State Bar Ethics Advisory Opinion No. 96-04 (1996) ("recording conversations to which an attorney is a party without prior disclosure to the other parties is not unethical when the act, considered within the context of the circumstances, does not involve dishonesty, fraud, deceit or misrepresentation"); Wis. Opinion E-94-5 ("whether the secret recording of a telephone conversation by a lawyer involves 'dishonesty, fraud, deceit or misrepresentation' under SCR 20:8.4(c) depends upon all the circumstances operating at the time").

¹³ CAL. PENAL CODE §§631, 632; FLA. STAT. ANN. §934.03; ILL. COMP. STAT. ANN. ch. 720, §§5/14-2, 5/14-3; MASS. GEN. LAWS ANN. ch. 272 §99; MICH. COMP. LAWS ANN. §750.539c; MONT. CODE ANN. §45-8-213; N.H. REV. STAT. ANN. § 570-A:2; ORE. REV. STAT. §165.540 (face to face conversations all party consent; telephone conversations one party consent); PA. STAT. ANN. tit.18, §5704; WASH. REV. CODE ANN. §9.73.030.

¹⁴ *Colorado Bar Association Ethics Committee, Ethics Opinion 112* (2003); *South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 08-13* (2008).

¹⁵ *State Bar of Arizona, Committee on the Rules of Professional Responsibility, Opinion No. 00-04* (2000); *Idaho State Bar Committee on Ethics and Professional Responsibility Formal Opinion 130* (1991); *Indiana State Bar Association, Legal Ethics Committee, Opinion No.1, 2000* (2000); *Iowa Supreme Court Board of Professional Ethics and Conduct, Ethics Opinion 83-16* (1982), *aff'd*, *Iowa Supreme Court Board of Professional Ethics and Conduct, Ethics Opinion*

Not Unethical Per Se

A substantial number of states, however, agree with the ABA's *Formal Opinion 01-422* that a recording with the consent of one but not all of the parties to a conversation is not unethical per se unless it is illegal or contrary to some other ethical standard. This is the position of Alabama, Alaska, Hawaii, Minnesota, Missouri, Nebraska, New York, Ohio, Oregon, Tennessee, Texas, Utah, and Vermont.¹⁶ Four other states—Maine, Mississippi, North Carolina, and Oklahoma—issued comparable opinions before the ABA's *Formal Opinion 01-422* was released and have never withdrawn or modified them.¹⁷ Yet, even among those that now believe that secret recording is not per se unethical, some ambivalence seems to remain. Nebraska, for example, refers to full disclosure as the “better practice.”¹⁸ New Mexico notes that the “prudent New Mexico lawyer” hesitates to record without the knowledge of all parties.¹⁹ Minnesota cautions that surreptitiously recording client conversations “is certainly inadvisable” except under limited circumstances.²⁰

Although the largest block of states endorses this view, whether it is a majority view is uncertain because a number of jurisdictions have apparently yet to announce a position, for example, Arkansas, Connecticut, Delaware, Georgia, Louisiana, Nevada, New Jersey, North Dakota, Rhode Island, West Virginia, and Wyoming.

Exceptions

Lying

Besides Rule 8.4's prohibition on unlawful, fraudulent, deceptive conduct, the Code of Professional Conduct also condemns making a false statement of material fact or law.²¹

95-09 (1995); *Kansas Bar Association Opinion* 96-9 (1997); *Kentucky Bar Association Ethics Opinions* KBA E-289, KBA E-279 (1984).

¹⁶ *Alabama State Bar Disciplinary Commission Formal Opinion* 1983-183 (as modified); *Alaska Bar Association Ethics Committee, Ethics Opinion No. 2003-1* (2003); *Hawaii Formal Opinion No. 30* (1988)(per se opinion)(no longer in effect); *Minnesota Lawyers Professional Responsibility Board Repeal of Opinion No. 18* (repealing earlier per se opinion); *Missouri Supreme Court Advisory Committee, Formal Opinion* 123 (2006); *Nebraska Ethics Advisory Opinion for Lawyers No. 06-07*(2006); *Association of the Bar of City of New York, Formal Opinion No. 2003-02* (2004); *Ohio Board of Commissioners on Grievances & Discipline Opinion No. 2012-1* (2012); *Oregon State Bar Association Formal Opinion No. 2005-156* (2005); TENN. R. PROF. COND. Rule 8.4, cmt.[6]; *Supreme Court of Texas Professional Ethics Committee Opinion No. 575* (2006); *Utah State Bar Ethics Advisory Opinion No. 02-05* (2002); *In re PRB*, 187 Vt. 35, 989 A.2d 523 (2009).

¹⁷ *Maine Board of Overseers of the Bar, Professional Ethics Commission, Opinion No. 168* (1999); *Mississippi Bar v. Attorney ST.*, 621 So.2d 229 (Miss. 1993); *North Carolina State Bar Ethics Opinion* RPC 171 (1994); *Oklahoma Bar Association Ethics Opinion No. 307* (1994).

¹⁸ *Nebraska Ethics Advisory Opinion for Lawyers No. 06-07*(2006)(It is the opinion of this Committee that, while the better practice for attorneys is to disclose or obtain consent prior to recording a conversation, attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation”).

¹⁹ *New Mexico Ethics Advisory Committee, Formal Ethics Advisory Opinion* 2005-03 (2005)(“Despite the withdrawal of ABA Formal Opinion 337, the Committee believes that the prudent New Mexico lawyer will still be hesitant to record conversations without the other party’s knowledge”).

²⁰ *Minnesota Lawyers Professional Responsibility Board Repeal of Opinion No. 18, Minnesota Lawyer* (June 3, 2002)(“[A]lthough it may not be unethical to record client conversations, except in very limited circumstances (e.g., client is making threats to the lawyer) it is certainly inadvisable to do so without disclosure”).

²¹ ABA CODE OF PROF. COND. Rule 4.1(a)(“In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person”); see also ABA CODE OF PROF. COND. Rule

As a consequence even when surreptitious recording is not considered a per se violation, it will be considered unethical if it also involves a denial that the conversation is being recorded or some similar form of deception.²²

Evidence Gathering

While illegality and false statements exist as exceptions to a general rule that permits surreptitious recording, evidence gathering is an exception to a general rule that prohibits such recordings. The earlier ABA opinion conceded a possible exception when prosecuting attorneys engaged in surreptitious recording pursuant to court order.²³ Various jurisdictions have expanded the exception to include defense attorneys as well as prosecutors.²⁴ Some have included use in the connection with other investigations as well.²⁵

8.4(b),(c) (“It is professional misconduct for a lawyer to ... (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; [or] (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation”).

²² ABA Formal Opinion 01-422 [3] (“A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded”); *Alaska Bar Association Ethics Committee, Ethics Opinion No. 2003-1* (2003) (“Absent conduct reflecting actual misrepresentations, deceit, or fraud when taping the conversation ... an attorney does not act unethically by recording a conversation with a third party without disclosure of such recording”); *Maine Board of Overseers of the Bar, Professional Ethics Commission, Opinion No. 168* (1999) (“However, the fact that the act of recording is not per se unethical still requires that the recording attorney’s conduct must otherwise not be dishonest, fraudulent, deceitful or involve misrepresentation”); *Minnesota Lawyers Professional Responsibility Board Repeal of Opinion No. 18, Minnesota Lawyer* (June 3, 2002) (“Moreover, lawyers who falsely deny recording conversations will be subject to discipline under Rules 4.1 and 8.4(c)”); *Mississippi Bar v. Attorney ST.*, 621 So.2d 229 (Miss. 1993) (“We find, however, that Attorney ST stepped over the line in violation of the Mississippi Rules of Professional Conduct when he blatantly denied, when asked, that he was taping the conversations.... Attorney ST’s actions therefore violate the very precepts of Rule 4.1”); see also, *Nebraska Ethics Advisory Opinion for Lawyers No. 06-07* (2006); *Oklahoma Bar Association Ethics Opinion No. 307* (1994); *Oregon State Bar Association Formal Opinion No. 2005-156* (2005); *Supreme Court of Texas Professional Ethics Committee Opinion No. 575* (2006); *In re PRB*, 187 Vt. 35, 43, 989 A.2d 523, 528 (2009).

²³ ABA Formal Opinion No. 337.

²⁴ E.g., *State Bar of Arizona, Committee on the Rules of Professional Responsibility, Opinion No. 95-03* (1995) (“... [W]e extended the criminal law enforcement exceptions of Opinion No. 75-13 [relating to recording by prosecutors in connection with a criminal investigation] to lawyers retained to represent criminal defendants”); *Colorado Bar Association Ethics Committee, Ethics Opinion 112* (2003) (“The Committee believes that, assuming that relevant law does not prohibit the recording, there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence”); *Kentucky Bar Association Ethics Opinion KBA E-279* (1984) (“An attorney who is not representing a client in a criminal case may not record conversations with witnesses, opposing counsel, clients, judges, or the public at large without the prior knowledge or consent of all parties to the conversation. In a criminal case, however, both defense and prosecution may record with the consent of one party to the conversation”).

²⁵ E.g., *District of Columbia Bar Opinion No. 229* (1992) (“A lawyer who tapes a meeting attended by him, his client, and representatives of a federal agency investigating his client commits no ethical violation, even if he does not reveal that a tape is being made, so long as the attorney makes no affirmative misrepresentations about the taping”); *Virginia State Bar Association Legal Ethics Opinion 1738* (2000) (“[T]he committee is of the opinion that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations. The committee is further of the opinion that it is not improper for a lawyer engaged in such an investigation to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful”).

Other Exceptions

Other circumstances thought to permit a lawyer to record a conversation without the consent of all of the parties to the discussion in one jurisdiction or another include instances when the lawyer does so in a matter unrelated to the practice of law;²⁶ or when the recorded statements themselves constitute crimes such as bribery offers or threats;²⁷ or when the recording is made solely for the purpose of creating a memorandum for the files;²⁸ or when the “the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good.”²⁹

Attachment

What follows are excerpts or summaries from opinions of the various bar associations that address the issue of whether members of the bar may record a conversation without the consent of each of the participants.

Alabama

Alabama State Bar Disciplinary Commission Formal Opinion 1983-183: “In issuing the opinion heretofore published in the May, 1984, Alabama Lawyer as a precedent we relied primarily upon Formal Opinion 337 (1974) of the American Bar Association Committee on Ethics and Professional Responsibility. Upon reconsideration we conclude that there is no provision of the Code of Professional Responsibility of the Alabama State Bar which directly precludes an attorney who is one of the conversants from recording conversations as described herein. One member of the Disciplinary Commission respectfully dissents and is of the opinion that an attorney’s recording of such conversations without the knowledge and consent of all parties thereto in and of itself constitutes ‘deceit’ [DR 1-102(a)(4)]. In issuing this modification, the Disciplinary Commission expresses its intent that this opinion is to be strictly construed.”

Alabama State Bar Disciplinary Commission Formal Opinion 1983-183(1984)(reprinted in *Alabama Lawyer* (May, 1984)(reconsidered and modified as noted above)): “It is unethical for an

²⁶ *Colorado Bar Association Ethics Committee, Ethics Opinion 112* (2003)(“The Committee believes that, assuming that relevant law does not prohibit the recording, there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another ... (b) in matters unrelated to a lawyer’s representation of a client or the practice of law, but the lawyer’s private life”); *South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 08-13* (2008)(“[T]he Committee advises that surreptitious recording by a lawyer is ethically permissible only when a) the lawyer is not acting as a lawyer, as a public official, or in any other position of trust and b) such recording is not otherwise prohibited by law”); *District of Columbia Bar Opinion No. 323* (2004)(“The Virginia Standing Committee on Legal Ethics recently recognized the parallel between law enforcement and intelligence activity in an opinion that is consistent with our views. In Va. Legal Ethics Opinion 1738 (2000), the Virginia Standing Committee considered whether the ethical rule prohibiting non-consensual tape recording then in effect in Virginia applied to law enforcement undercover activities. The Virginia Standing Committee concluded that it did not.... The reasoning is equally persuasive to this Committee”).

²⁷ *State Bar of Arizona Committee on the Rules of Professional Responsibility Opinion No. 95-03* (1995).

²⁸ *Kansas Bar Association Opinion 96-9* (1997); *South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 08-13* (2008)(“... While representing a client, a lawyer may not surreptitiously record any conversation, subject to certain law enforcement related exceptions.... recording of anonymous threats received over the telephone, recording of anonymous information received over the telephone, recording attempts to bribe the recording attorney, and cooperating with law enforcement in a legitimate criminal investigation”); *Virginia State Bar Association Legal Ethics Opinion 1738* (2000)(“ Finally, the committee opines that it is not improper for a lawyer to record a conversation involving threatened or actual criminal activity when the lawyer is a victim of such threat”).

²⁹ *Association of the Bar of City of New York, Formal Opinion No. 2003-02* (2004).

attorney or his investigator or other person acting on behalf of an attorney to make recordings of conversations with clients, other attorneys, witnesses or other without prior knowledge and consent of all parties to the conversation.

Alaska

Alaska Bar Association Ethics Committee, Ethics Opinion No. 2003-1 (2003): “In summary, the Committee is of the opinion that, while the better practice may be for attorneys to disclose or obtain consent prior to recording a conversation, attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation. Absent conduct reflecting actual misrepresentations, deceit, or fraud when taping the conversation, or circumstances in which the taping violated existing law or infringed on a specific court defined privacy right, an attorney does not act unethically by recording a conversation with a third party without disclosure of such recording.”

Alaska Bar Association Ethics Committee Ethics Opinion No. 92-2 (1992)(withdrawn and replaced by Ethics Opinion No. 2003-1 above): “An attorney may not ethically use a transcript of a telephone conversation with knowledge that another attorney surreptitiously recorded it because the use involves the attorney in the conduct that made the original act of recording unethical under DR 1-102(A)(4).”

Alaska Bar Association Ethics Committee Ethics Opinion No. 91-4 (1991)(withdrawn and replaced by Ethics Opinion No. 2003-1 above): “The Committee has been asked to review Ethics Opinion 78-1, which held it was unethical for an attorney to record a telephone conversation in which the attorney participated without the consent of the other party and advises whether that opinion was applicable to an attorney who is party to a family law matter, acting in a personal capacity.

“... [T]he Committee is of the opinion that the findings and assumptions of the American Bar Association Committee expressed in ABA Formal Opinion 337 remain valid today: that a failure to give notice of the recording of a conversation to all parties is the equivalent of a representation that the conversation is not being recorded, and is thus deceitful in violation of DR 1-102(A)(4).

“With regard to actions taken by a lawyer in a personal rather than professional capacity, the scope of DR 1-102(A)(4) is viewed as extending beyond actions in a professional capacity and extends to the lawyer’s person or private conduct which reflects on honesty or character.”

Arizona

State Bar of Arizona, Committee on the Rules of Professional Responsibility, Opinion No. 00-04 (2000): “We hasten to add that, while an attorney may advise a client about the client’s right to surreptitiously tape record conversations, the attorney may not participate in the surreptitious tape recording of a conversation, except as permitted by our prior opinions. Further, even if a client does not raise the issue of surreptitious tape recording, the attorney may on the attorney’s own initiative advise the client about the client’s right to surreptitiously tape record conversations under Arizona law. Finally, attorneys may not sue third parties to tape record conversations which an attorney ethically cannot tape record under the prior opinions of the Committee.”

State Bar of Arizona, Committee on the Rules of Professional Responsibility, Opinion No. 95-03 (1995): “Opinion 75-13 first adopted the following general rule concerning the ethical propriety of secretly recording conversations: ‘We are of the opinion that it is improper for a lawyer to record by tape recorder or other electronic device any conversation between the lawyer or

other person, or between third persons, without the consent or prior knowledge of all parties to the conversation. This prohibition likewise precludes a lawyer from doing directly through a non-lawyer agent what he may not himself do.’

“Opinion 75-13 then recognized that there are certain necessary exceptions to this rule. Four were identified: 1. An attorney secretly may record ‘an utterance that is itself a crime, such as an offer of a bribe, a threat, an attempt to extort, or an obscene telephone call.’ 2. A lawyer may secretly record a conversation in order to protect against perjury. 3. A prosecutor or police officer may secretly record a conversation during the course of a criminal investigation. 4. The opinion recognized ‘that secret recording would be proper where specifically authorized by statute, court rule, or court order.’ ...

“The Committee most recently considered this subject in Opinion 90-02, dated March 16, 1990. This opinion broadened the conclusions of Opinion 75-13 in two ways. First, it stated that Opinion 75-13’s distinction, in a criminal law setting, ‘between surreptitious recording to protect against perjury (which the opinion permitted) and surreptitious recording for impeachment purposes (which the opinion prohibited) does not appear to have any basis in the present Rules of Professional Conduct.’ Second, we extended the criminal law enforcement exceptions of Opinion No. 75-13 to lawyers retained to represent criminal defendants....

“We conclude that the secret tape recording of a telephone conversation with opposing counsel involves an element of deceit and misrepresentation.... Attorneys do not expect that their opponent is recording a telephone conversation.”

California

Recording face to face or telephone conversations is a crime under California law, Cal. Pen. Code §§631-632.7. There is no general one party consent exception, although there are exceptions for law enforcement, Cal. Pen. Code §§633, 633.1, and for recording conversations related to extortion, kidnapping, bribery and felonies involving violence, Cal. Pen. Code §633.5.

Colorado

Colorado Bar Association Ethics Committee, Ethics Opinion 112 (2003): “Because surreptitious recording of conversations or statements by an attorney may involve an element of trickery or deceit, it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law. For the same reason, a lawyer generally may not direct or even authorize an agent to surreptitiously record conversations, and may not use the ‘fruit’ of such improper recordings. However, where a client lawfully and independently records conversations, the lawyer is not required to advise the client to cease its recording, nor to decline to use the lawfully and independently obtained recording.

“The Committee believes that, assuming that relevant law does not prohibit the recording, there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence; and (b) in matters unrelated to a lawyer’s representation of a client or the practice of law, but the lawyer’s private life.”

People v. Smith, 778 P.2d 685, 686, 687 (Colo. 1989): “In May of 1984, the respondent agreed to perform undercover activities of the Colorado Bureau of Investigation (CBI) with respect to an investigation of the complaining witness. Upon advice of an assistant state attorney general,

CBI representatives requested that the respondent record telephone conversations secretly. After obtaining assurances from a member of the attorney general's office that such conduct would not violate the Code of Professional responsibility, the respondent agreed.... The undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound. We conclude that these acts violated the provisions of DRI-102(A)(4).

"The respondent asserts that his conduct should be deemed an exception to these ethical considerations because he was acting under the direction of and pursuant to the advice of law enforcement officials.... The respondent, however, was a private attorney, not a prosecuting attorney."

District of Columbia

District of Columbia Bar Opinion No. 323 (2004): "The Virginia Standing Committee on Legal Ethics recently recognized the parallel between law enforcement and intelligence activity in an opinion that is consistent with our views. In Va. Legal Ethics Opinion 1738 (2000), the Virginia Standing Committee considered whether the ethical rule prohibiting non-consensual tape recording then in effect in Virginia applied to law enforcement undercover activities. The Virginia Standing Committee concluded that it did not.... The reasoning is equally persuasive to this Committee."

District of Columbia Bar Opinion No. 229 (1992): "A lawyer who tapes a meeting attended by him, his client, and representatives of a federal agency investigating his client commits no ethical violation, even if he does not reveal that a tape is being made, so long as the attorney makes no affirmative misrepresentations about the taping. The agency reasonably should not expect that the preliminary phase discussions are confidential. The agency also should expect that such discussions will be memorialized in some fashion by the investigated party's attorney and that the record made may be used to support a claim against the agency."

Florida

Recording face to face or telephone conversations is a crime under Florida law, FLA. STAT. ANN. §834.03. There is a one party consent exception for those acting under color of law (police officers), and a general all party consent exception of those not acting under color of law, *Id.* The Florida Rules of Professional Conduct declare that a lawyer shall not "... commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," Rule 8.4(b).

Hawaii

Hawaii Formal Opinion No. 30 (1988) (this opinion is no longer listed among those currently in effect by the Disciplinary Board of the Hawaii Supreme Court): "Inquiry has been made concerning the ethical propriety of the electronic recording by a lawyer of a conversation between the lawyer and another person without that person's prior knowledge and consent.... [E]ven if such conduct is not illegal, it offends the traditional high standard of fairness and condor which should characterize the practice of law and must be deemed improper, except in the special situations mentioned below.... Therefore no lawyer should record or cause to be recorded any conversation, whether by taps or other electronic device, without the consent or prior knowledge of all parties to the conversation. There may be extraordinary circumstances in which secret recordings of conversations by lawyers are rendered permissible, such as where, for

example, sanctioned by express statutory or judicial authority. This opinion is not directed toward such exceptions, each of which must be considered on its own merits.”

Idaho

Idaho State Bar Committee on Ethics and Professional Responsibility Formal Opinion 130 (1991): “The Committee has been asked to answer the question of whether it is a violation of the Idaho Rules of Professional Conduct to record a telephone conversation without notifying the other party or parties that the conversation is being recorded. Particular attention is directed to instances involving conversations with clients, opposing counsel, potential witnesses, and members of the public. The recording of telephone conversations is permitted by Federal Law ... and by Idaho Law.... As long as one party to the conversation consents, a recordation may be made, without notice to any other participant in the conversation. Therefore, the recordation of a telephone conversation, in the manner prescribed by these statutes would not be criminal conduct prohibited by IRPC 8.4(b). The Committee feels, however, that such recordation would nonetheless be a violation IRPC 8.4(d) which states: It is professional misconduct for a lawyer to: ... (d) engage in conduct that is prejudicial to the administration of justice.... It is the opinion of the Committee that undisclosed recordation of communications between attorneys, or an attorney and a potential witness does not encourage the judicial system’s objectives. People are more cautious, and therefore less candid in their discussions, when they know, or believe their conversations are being recorded.

“... As to clients, all conversations between an attorney and the client are confidential, which every client has a right to expect and require. Therefore, the recordation of such a conversation should not impede the candid discussions between the client and the attorney.”

Illinois

Recording face to face or telephone conversations is a crime under Illinois law, ILL. COMP. STAT. ANN. ch. 720 §5/14-2. There are law enforcement exemptions, but there is no general one party consent exemption, ILL. COMP. STAT. ANN. ch. 720 §5/14-3. The Illinois Rules of Professional Conduct declare that a lawyer “shall not ... commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” Rule 8.4(a)(3).

Indiana

Indiana State Bar Association, Legal Ethics Committee, Opinion No.1, 2000 (2000), RES GESTAE 39 (March 2000): “... Although it is not illegal in the state of Indiana to tape record another person without that person’s knowledge, it is unethical for an attorney to do this to another attorney in the context of a pending legal matter without informing him first.”

Indiana State Bar Association, Legal Ethics Subcommittee, Formal Opinion No.2, 1975 (1975), RES GESTAE 234 (July 1975): “... It is therefore our opinion that it would be improper for an attorney to record any conversation, whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation. The only exception to this rule might occur under the circumstances described in the last paragraph above quoted [relating to recording for law enforcement purposes].”

Iowa

Iowa Supreme Court Board of Professional Ethics and Conduct, Ethics Opinion 98-28 (1999): “Question has arisen as to the propriety of attorneys advising clients who are protected by court orders in domestic abuse cases that they may record contacts initiated by defendants in violation of such orders without telling the defendant or obtaining consent.

“It is the opinion of the Board that the Iowa Code of Professional Responsibility for Lawyers does not prohibit such conduct and it is believed that advice may be given clients provided they are parties to the conversation.”

Iowa Supreme Court Board of Professional Ethics and Conduct, Ethics Opinion 95-09 (1995): “The Board is of the opinion that Formal Opinion 83-16 is correct and it hereby is reaffirmed.”

Iowa Supreme Court Board of Professional Ethics and Conduct, Ethics Opinion 83-16 (1982): “With certain exceptions spelled out in this opinion [relating to recording for purposes of law enforcement investigations], no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.”

Iowa State Bar Association v. Mollman, 488 N.W.2d 168, 169-70, 171-72 (Iowa 1992): “FBI agents offered Mollman immunity from prosecution if he would set up a cocaine ‘buy’ from Johnson, [his former client and long-time friend]. He was unwilling to prompt Johnson to deliberately break the law. Moreover, he thought that such a buy would mischaracterize Johnson as a dealer when, in fact, he believed Johnson had a drug problem and would secure cocaine for Mollman merely out of friendship.

“Mollman did agree, however, to wear a concealed body microphone so that federal agents could monitor and record a conversation with Johnson. The pretext for the conversation was Mollman’s and Johnson’s concern that several mutual friends had been subpoenaed to testify before a grand jury. Armed with a script written by federal agents, Mollman suggested that he and Johnson get their stories straight about their past drug usage. This intentionally incriminating conversation, and Mollman’s secret recording of it, took place in Johnson’s home.... The committee charged Mollman with violating the following provisions of the Iowa Code of Professional Responsibility: DR 1-102(A)(4) ... DR 4-101(B)(lawyer shall not knowingly reveal the confidence or secret of a client or use them to lawyer’s own advantage) ... In addition, the committee alleged that Mollman’s conduct violated the committee’s formal advisory opinion 83-16 which provides that ‘no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.’ This rule adopted in 1982 and modeled after ABA Formal Opinion 337, makes such recordings unethical even if legal under federal law....

“Beyond this proof of deceitful conduct, the committee sought to prove that Mollman violated formal opinion 83-16. As noted earlier, the opinion outlaws any surreptitious recording of conversations by lawyers.... Not all recordings, however, are necessarily banned: There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of state or local government or law enforcement attorneys or officer acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements....

“Mollman does not contest the wisdom or spirit of formal opinion 83-16 on appeal. He merely claims that because he acted ‘under the direction of federal prosecutors, he should benefit from the rule’s exception. The commission was not so convinced, and neither are we. First, the plain language of the rule limits its exception to ‘law enforcement attorneys or officers’ It

makes no room for private citizens acting as government agents as Mollman describes himself.... Second, the rule itself declines to make the exception automatic.... Examining the exception in light of the present case, we are unable to justify its application.”

Kansas

Kansas Bar Association Opinion 96-9 (1997): “A lawyer inquired as to any ethical objections to his recording all telephone calls made from or received in his office for purposes of internal office management. He does not intend to inform those outside of his office of the practice. Even assuming such recording is legal, the practice of surreptitiously recording telephone conversations is considered offensive to the traditional high standards of fairness and candor that must characterize the practice of law. It is unprofessional for lawyers to secretly record conversations except with the consent of all parties—that are to be used for any purpose other than an accurate recital in memoranda to the files.”

Kentucky

Kentucky Bar Association Ethics Opinion KBA E-279 (1984): An attorney who is not representing a client in a criminal case may not record conversations with witnesses, opposing counsel, clients, judges, or the public at large without the prior knowledge or consent of all parties to the conversation. In a criminal case, however, both defense and prosecution may record with the consent of one party to the conversation.

Kentucky Bar Association Ethics Opinion KBA E-289 (1984): An attorney may not suggest that a client secretly record telephone conversations for use in a civil matter. The Code proscribes an attorney surreptitiously recording conversations directly or indirectly without the consent of all parties.

Maine

Maine Board of Overseers of the Bar, Professional Ethics Commission, Opinion No. 168 (1999): “We conclude, therefore, that, however much we would like to do so, we cannot find that electronically recording a conversation without the knowledge of the other participant(s) is per se prohibited by the text of the rule.... However, the fact that the act of recording is not per se unethical still requires that the recording attorney’s conduct must otherwise not be dishonest, fraudulent, deceitful or involve misrepresentation.”

Massachusetts

Massachusetts outlaws the recording without the consent of all parties to the conversation or when done for certain law enforcement purposes, MASS. GEN. LAWS ANN. ch. 272, §99. The Massachusetts Rules of Professional Conduct state that it is unethical for a lawyer to commit a criminal act that “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” MASS. R. PROF. COND. 8.4(b).

Michigan

Michigan Bar Association, Ethics Opinion RI-309 (1998): “Under Michigan law, it is not a violation of the Michigan eavesdropping statutes, MCL 750.539 et seq., for a participant in a conversation to secretly record that conversation without the consent of the other participants.... The committee believes that ABA Formal Opinion 337 is over broad, and the rationale which

supported its statement some twenty-four years ago has weakened. Whether a lawyer may ethically record a conversation without the consent or prior knowledge of the parties involved is situation specific, not unethical per se, and must be determined on a case by case basis.”

Minnesota

Minnesota Lawyers Professional Responsibility Board Repeal of Opinion No. 18, Minnesota Lawyer (June 3, 2002): “Lawyers should be aware that secret recording is illegal in some states and therefore prohibited by Rule 4.4. Moreover, lawyers who falsely deny recording conversations will be subject to discipline under Rules 4.1 and 8.4(c). And finally, although it may not be unethical to record client conversations, except in very limited circumstances (e.g., client is making threats to the lawyer) it is certainly inadvisable to do so without disclosure.”

Minnesota Lawyers Professional Responsibility Board Opinion No. 18 (1996)(repealed 2002): “It is professional misconduct for a lawyer, in connection with the lawyer’s professional activities, to record any conversation without the knowledge of all parties to the conversation, provided as follows: 1. This opinion does not prohibit a lawyer from recording a threat to engage in criminal conduct; 2. This opinion does not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation; 3. This opinion does not prohibit a government lawyer charged with civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation; 4. This opinion does not prohibit a lawyer from giving legal advice about the legality of recording a conversation.”

Mississippi

Mississippi Bar v. Attorney ST., 621 So.2d 229 (Miss. 1993): “[T]he Mississippi State Bar filed a formal complaint ... for surreptitiously taping two telephone conversations with an acting City Judge and one with the City Police Chief, and for telling the Chief he was not recording their conversation when, in fact he was.... In *Attorney M v. Mississippi State Bar*, 621 So.2d 220 (Miss. 1992), we held that, under certain circumstances, an attorney may tape a conversation with a potential party opponent without his knowledge or consent. In that case, Attorney M taped a series of conversations with a doctor who had treated a patient who later became a plaintiff in a malpractice action against another physician. Although the doctor assumed the conversations were taped, he did not know until he received a letter so indicating from Attorney M.

“In *Attorney M*, we revisited our opinion in *Netterville [v. Mississippi State Bar]*, 397 So.2d 878 (Miss. 1981)], wherein we held ‘that surreptitious tape recording is not unethical when the act, ‘considered within the context of the circumstances then existing’ does not rise to the level of dishonesty, fraud, deceit or misrepresentation.’ 621 So.2d. at 233, quoting *Netterville*, 397 So.2d at 883. In so ruling, we expressed our preference for a broader test than that espoused by Formal Op. 337.... Accordingly, we found in *Attorney M* that:

Under certain circumstances, for example, an attorney may be justified in making a surreptitious recording in order to protect himself or his client from the effects of future perjured testimony. On the other hand, an attorney who uses a secret recording for blackmail or to otherwise gain unfair advantage has clearly committed an unethical—if not-illegal act. Ethical complications arise not so much from surreptitious recordings per se as from the manner in which attorneys use them. The *Netterville* context-of-the-

circumstances test contemplates this distinction; Formal Op. 337 does not. 621 So.2d at 224

“Looking at the context of the circumstances, we are of the opinion that Attorney ST was acting to protect his client’s interests in surreptitiously taping the telephone conversations with the judge and the police chief. Pursuant to our decision in Attorney M, this action may well be justified and cannot be found unethical. We find, however, that Attorney ST stepped over the line in violation of the Mississippi Rules of Professional Conduct when he blatantly denied, when asked, that he was taping the conversations.... Attorney ST’s actions therefore violate the very precepts of Rule 4.1. As the Rule states: ‘In the course of representing a client, a lawyer shall not knowingly: a. make a false statement of material fact to a third person.’”

Missouri

Missouri Supreme Court Advisory Committee, Formal Opinion 123 (2006): “An attorney may record a conversation, in which the attorney is a party, without notifying the other parties to the conversation, unless other actors are present including, but not limited to: (1) laws prohibiting the recording in the jurisdiction in which the recording would occur, (2) the attorney states or implies that the conversation is not being recorded, or (3) the conversation involves a current client of the attorney.... If the recording is of a conversation with a current client, the attorney must give some notice to the client that the attorney is, or may be, recording the conversation.”

Missouri Supreme Court Advisory Committee, Misc. Opinion 30 (1978)(withdrawn):

“QUESTION: Can an attorney ethically record a conversation with any person, without prior knowledge of that person?

“ANSWER: No. The Committee adopts ABA Op. 337 ... This of course excepts those actions carried on by law enforcement agencies under control of court orders.”

Montana

Recording face to face or telephone conversations is a crime under Montana law unless all the parties consent, MONT. CODE ANN. §45-8-213. The Montana Rules of Professional Conduct declare: “a lawyer shall not ... commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” Rule 8.4(b).

Nebraska

Nebraska Ethics Advisory Opinion for Lawyers No. 06-07(2006): “It is the opinion of this Committee that, while the better practice for attorneys is to disclose or obtain consent prior to recording a conversation, attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation. Absent conduct reflecting actual misrepresentation, deceit or fraud when taping a conversation, or circumstances in which the taping violated existing law or infringed upon a specific court-defined privacy right, attorney does not act unethically by recording a conversation with a third party without disclosure of such recording.”

New Hampshire

Recording face to face or telephone conversations is a crime under the laws of New Hampshire, N.H. REV. STAT. ANN. §570-A:2. There are law enforcement and communications carrier exceptions, but there is no one party consent exception, *Id.* The New Hampshire Rules of

Professional Conduct declare: “a lawyer shall not ... commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” Rule 8.4(b).

New Mexico

New Mexico Ethics Advisory Committee, Formal Ethics Advisory Opinion 2005-03 (2005): “The Rules of Professional Conduct preclude the secret recording of a witness interview by a lawyer, or anyone acting under the lawyer’s control, if such a recording would involve deceiving the witness either by commission or omission.... Despite the withdrawal of ABA Formal Opinion 337, the Committee believes that the prudent New Mexico lawyer will still be hesitant to record conversations without the other party’s knowledge ... In doing so, the Committee does not mean to opine that under no circumstances would the practice be permissible.”

New Mexico Ethics Advisory Committee, Formal Ethics Advisory Opinion 1996-2 (1996): Members of the bar are advised that there are no clear guidelines and that the prudent attorney avoids surreptitious recording.

New York

Association of the Bar of City of New York, Formal Opinion No. 2003-02 (2004): “N.Y. City 80-95 and 95-10 are modified. A lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good. However, undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice.”

Association of the Bar of City of New York, Formal Opinion No. 1995-10 (1995): “May a lawyer tape record a telephone or in-person conversation with an adversary attorney without informing that attorney that the conversation is being taped?

“The inquirer wishes systematically to tape record conversations between herself and opposing counsel without advising opposing counsel that the conversations are being recorded. She asks whether secretly recording conversations in this way whether the conversations she seeks to record will be by telephone or in person, our conclusion is the same in either case. We answer the inquiry in the negative.... Our opinion is based solely on the facts set forth above and is limited to the context of attorney-attorney taping. We express no opinion as to whether the Committee might, in the future, reach a different conclusion upon the submission of an inquiry involving different facts or extenuating circumstances.”

NY County Lawyer’s Association Opinion No. 696 (1993): “Numerous bar associations have opposed lawyers’ participation in secret recordings of telephone conversations on the ground that such conduct involves ‘dishonesty, fraud, deceit or misrepresentation’ within the meaning of DR 1-102(A)(4). See, e.g., ABA 337; N.Y. State 328 (1974). In fact, this Committee stated that ‘[t]he tape recording of a telephone conversation between two attorneys, whom the Committee assumes are adversaries, by one of the participants for future use in pending prospective litigation is underhanded and deceptive and fails to satisfy the standards of Canon 22 [of the Canons of Professional Ethics (1908) requiring that all acts of a lawyer be characterized by candor and fairness], and, consequently is unethical and nonprofessional.’ N.Y. County 552 (1967).

“Both ABA 337 and N.Y. State 328 prohibit secret recordings unless sanctioned by express statutory or judicial authority. The ABA opinion, while citing various state ethics opinions, provides no independent reason for the prohibition. Likewise, the N.Y. State opinion provides no independent reason for prohibiting secret recordings, but rather relies on such concepts as

‘elemental fairness.’ We find such reliance unpersuasive for reason articulated by the New York City ethics committee: [W]e do not believe that ethical committees are free to determine what conduct is unfair or lacking in candor in a vacuum. Unlike more explicit ethical prohibitions, concepts like candor and fairness take their content from a host of sources—articulated and unarticulated—which presumably reflect a consensus of the bar’s or society’s judgments. Without being unduly relativistic, it is nevertheless possible that conduct that is considered unfair or even deceitful in one context may not be so considered in another. N.Y. City 80-95 (1981).

“We believe that the secret recording of a telephone conversation, where one party to the conversation has consented, cannot be deceitful per se. Since such conduct [is lawful under New York and federal law], a party to a telephone conversation should reasonably expect the possibility that his or her conversation may be recorded.... It should be noted that there may be circumstances in which a secret recording would violate specific provisions of the Code and thus would be ethically improper.... [I]f a lawyer is asked by the other party to the conversation whether the discussion is being recorded, the lawyer may not falsely assert that the conversation is not being recorded.”

New York State Bar Association, Committee on Professional Ethics, Opinion 515 (1979): “... In N.Y. State [Op.] 328 (1974) we concluded that except in special situations it is improper for a lawyer engaged in private practice to record electronically a conversation with another attorney or any other person without first advising the other party. We said that even if secret electronic recording of a conversation with one party’s consent is not illegal, it offends the traditional standards of fairness and candor that should characterize the practice of law.”

North Carolina

North Carolina State Bar Ethics Opinion RPC 192 (1995): “A lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client’s case.”

North Carolina State Bar Ethics Opinion RPC 171 (1994): “Is it unethical for an attorney to make a tape recording of a conversation with an opposing attorney regarding a pending case, without disclosing to the opposing attorney that the conversation is being recorded? No.... However, as a matter of professionalism, lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded.”

Ohio

Ohio Board of Commissioners on Grievances & Discipline Opinion No. 2012-1 (2012): “A surreptitious or secret, recording of a conversation by a Ohio lawyer is not a per se violation of Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording took place....

Although surreptitious recording is not inherently unethical, the acts associated with a lawyer’s surreptitious recording may constitute a violation of Prof. Cond. R. 8.4(c) or other Rules of Professional Conduct. As a basic rule, Ohio lawyers should not record conversations with clients without their consent.... and Ohio lawyers should also refrain from nonconsensual recordings of conversations with persons who are prospective clients ...”

Ohio Board of Commissioners on Grievances & Discipline Opinion No. 97-3 (1997)(withdrawn): “[T]his Board advises that an attorney in the course of legal representation should not make surreptitious recordings of his or her conversations with clients,

witnesses, opposing parties, opposing counsel, or others without their notification or consent. The act of surreptitious recording by attorneys may violate DR 1-102(A)(4) unless the act when considered in the context of the circumstances does not rise to the level of dishonesty, fraud, deceit, or misrepresentation. The burden would be upon each individual attorney to justify on a case by case basis why the facts and circumstances surrounding the surreptitious recording did not violate DR 1-102(A)(4). Recognized exceptions to the prohibition on surreptitious recording include the prosecuting and law enforcement attorney exception; the criminal defense attorney exception; and the extraordinary circumstances exception.”

Oklahoma

Oklahoma Bar Association Ethics Opinion No. 307 (1994): Surreptitious recording is not per se unethical. A lawyer may secretly record his or her conversations without the knowledge or consent of other parties to the conversation unless the recording is unlawful or in violation of some ethical standard involving more than simply recording (e.g., lying about whether conversation is being recorded).

Oregon

Oregon State Bar Association Formal Opinion No. 2005-156 (2005): “Oregon law allows one party to a telephone conversation to record the conversation without notice to or consent of the other person. However, in-person conversations may not be recorded unless all persons participating know or have notice that the conversation is being recorded. A lawyer who makes a recording in knowing disregard of statutory prohibitions to the contrary would be in violation of Oregon PRPC 3.3(a)(5), which prohibits a lawyer from knowingly engaging in illegal conduct. See also Oregon RPC 8.4(a)(2), which makes it professional misconduct for a lawyer to ‘[c]ommit a criminal act that reflects adversely on the lawyer’s honest, trustworthiness or fitness as a lawyer in other respects.’ If the substantive law does not prohibit a recording, however, and in the absence of conduct that would affirmatively lead a person to believe that no recording would be made, the lawyer may make the recording.”

Oregon State Bar Association Formal Opinion No. 1991-74 (1991): Oregon permits recording telephone conversations with one party consent, but requires the consent of all parties to record face to face conversations. An attorney may not engage in illegal conduct and therefore may not record a face to face conversation, but with one party consent he or she may record a telephone conversation “in absence of conduct which would reasonably lead an individual to believe that no recording would be made.”

Pennsylvania

Recording face to face or telephone conversations is a crime under Pennsylvania law, PA. STAT. ANN. tit.18 §5703. There are law enforcement exemptions, but there is no general one party consent exemption, PA. STAT. ANN. tit.18 §5703. The Pennsylvania Rules of Professional Conduct declare that “a lawyer shall not ... commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” Rule 8.4(b).

South Carolina

South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 08-13 (2008): “... While representing a client, a lawyer may not surreptitiously record any conversation, subject to certain law enforcement related exceptions.... recording of anonymous threats received over the

telephone, recording of anonymous information received over the telephone, recording attempts to bribe the recording attorney, and cooperating with law enforcement in a legitimate criminal investigation. As noted in *Anonymous II*, the Court in *Anonymous I* relied primarily on ABA Formal Opinion 337 ... and each South Carolina opinion since has relied in turn on *Anonymous I*. Formal Opinion 337, however ... was ultimately withdrawn in 2001 by ABA Formal Opinion 01-422. South Carolina has not correspondingly withdrawn its prohibition.... [T]he Committee advises that surreptitious recording by a lawyer is ethically permissible only when a) the lawyer is not acting as a lawyer, as a public official, or in any other position of trust and b) such recording is not otherwise prohibited by law.”

South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 92-17 (1992): “Rule of Professional Conduct 8.4(d) states that ‘[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonest, fraud, deceit, or misrepresentation.’ The South Carolina Supreme Court has construed this language to preclude an attorney from recording any conversation or portion of a conversation without the prior knowledge and consent of all parties to the conversation, irrespective of the purpose for which the recording is made. *In re Anonymous*, 404 S.E. 2d 513 (S.C. 1991). The Court has also held that the language of Rule 8.4(d) precludes an attorney from engaging in a scheme to entrap and secretly record a Family Court Judge who is allegedly involved in judicial misconduct. *In re Warner*, 335 S.E.2d 90 (S.C. 1985).

“The Court’s single exception to these rules applies when an attorney records a conversation made with the prior consent or at the request of an appropriate law enforcement agency in the course of a legitimate criminal investigation.... [W]hile Warner can be read narrowly only to prohibit an attorney from assisting a client to secretly record conversations with a judge which would then be used to prove judicial misconduct, Warner can also be read broadly to prohibit an attorney from counseling or assisting anyone to secretly record any conversation with anyone. Until Warner is clarified, this area remains uncertain and the prudent course would seem to be to give Warner a broad reading.”

South Dakota

Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 698-99 (8th Cir. 2003): Appellate court upholds sanctions imposed on attorneys for conduct unethical under South Dakota Rules of Professional Conduct involve inappropriate contact with a represented party witness and surreptitious recording of witness statements while posing as a customer.

“Although the violations of Rule 4.2 alone would be sufficient to impose the evidentiary sanctions at issue here, they are further justified by the specific circumstances surrounding those violations. While there is no evidence that Arctic Cat’s counsel directly contacted Becker or ‘Bill,’ the Model Rules of Professional Conduct prohibit a lawyer from violating the Rules ‘through the acts of another.’ Model Rules of Prof’l Conduct R. 8.4(a). Mohr’s interviews took place under false and misleading pretenses, which Mohr made no effort to correct. Not only did Mohr pose as a customer, he wore a hidden device that secretly recorded his conversations with Becker and ‘Bill.’

“Model Rule 8.4(c) prohibits ‘conduct involving dishonesty, fraud, deceit or misrepresentation.’ The district court found that Mohr’s conduct in making secret recordings of his conversations with Becker and ‘Bill’ necessarily involved deceit or misrepresentation. In reasoning that it is unethical for an attorney or investigator to record conversations without the consent of the other party, the district court relied on cases from other jurisdictions and on the ABA Committee on Ethics and Professional Responsibility’s Formal Opinion 337 (1974) (‘No lawyer should record

any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.’).

“After the district court issued its opinion, the ABA published a new Formal Opinion which reverses its position in Formal Opinion 337 and states that a lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules of Professional Conduct. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 422 (2001). The ABA advised that ‘[a] lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of the parties, nor falsely represent that a conversation is not being recorded.’ Id. The laws of South Dakota permit recording by one party to a conversation without the knowledge or consent of the other party. *South Dakota v. Braddock*, 452 N.W.2d 785, 788 (1990).

“Nevertheless, conduct that is legal may not be ethical. The ABA suggests that nonconsensual recordings be prohibited ‘where [the recording] is accompanied by other circumstances that make it unethical.’ ABA Comm. on Ethic and Prof’l Responsibility, Formal Op. 01-422. Mohr’s unethical contact with Becker and ‘Bill’ combined with the nonconsensual recording presents the type of situation where even the new Formal Opinion would authorize sanctions.

“The duty to refrain from conduct that involves deceit or misrepresentation should preclude any attorney from participating in the type of surreptitious conduct that occurred here. As Mohr’s deposition testimony makes clear, his covert recordings were conducted with Arctic Cat’s attorneys’ knowledge and approval. In addition, there is evidence in the record that the course of conduct by Mohr was not only ratified by Arctic Cat’s counsel, but that it was directed by them. Arctic Cat’s attorneys admit that the intent behind Mohr’s retention was to determine whether Elliott was continuing to sell and service Arctic Cat snowmobiles in order to rebut Elliott’s damages expert at trial.”

Tennessee

TENNESSEE RULES OF PROFESSIONAL CONDUCT

Rule 8.4 Misconduct

“It is professional misconduct for a lawyer to:

“(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

“(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects;

“(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; ...

“Comment

* * *

“[6] The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. *See* RPC 4.4.”

Tennessee Board Professional Responsibility Formal Ethics Opinion No. 86-F-14(a) (1986):

“Request has been made for reconsideration and clarification of Formal Ethics Opinion 81-F-14 concerning recording of conversations by criminal defense attorneys without the knowledge of all parties to the conversation. Formal Ethics Opinion 81-F-14 adopted ABA Formal Opinion 337

ruling that secret recording of conversations by an attorney constitutes conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A) of the Code of Professional Responsibility ... There is no ethical impropriety in secretly recording potentially adverse witnesses in criminal cases for the purpose of providing a means of impeachment in a criminal trial, provided one party to the communication has consented and provided such recording does not violate any law. Further, any lawyer may record an utterance which is itself a felonious crime, including bribe offers and attempted extortions, provided one party to the communication has consented and provided such recording does not violate any law.”

Cleckner v. Dale, 719 S.W.2d 535, 537 n.l (Tenn.App. 1986): “Dale recorded this telephone conversation without Cleckner’s knowledge or consent. The practice of tape recording any private conversation without the consent or prior knowledge of all parties to the conversation is a violation of the Code of Professional Responsibility, See A.B.A. Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974)) and Tenn. Bd. of Professional Responsibility, Formal Op. 81- F-14 (1981). An attorney’s use against a client of a clandestine recording of a conversation with the client is also a violation of Tenn. S. Ct. Rule 8, EC 4-5.”

Texas

Supreme Court of Texas Professional Ethics Committee Opinion No. 575 (2006): “The Texas Disciplinary Rules of Professional Conduct do not prohibit a Texas lawyer from making an undisclosed recording of the lawyer’s telephone conversations provided that (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in an recording is appropriately protected by the lawyer in accordance with Rule 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the lawyer to any person. Opinions 392 and 514 are overruled.”

Utah

Utah State Bar Ethics Advisory Opinion No. 02-05 (2002): “What are the ethical considerations for a government lawyer who participates in a lawful covert governmental operation, such as a law enforcement investigation of suspected illegal activity or an intelligence gathering activity, when the covert operation entails conduct employing dishonesty, fraud, misrepresentation or deceit? ... We conclude that the mere act of secretly but lawfully recording a conversation inherently is not deceitful, and leave for another day the separate question of when investigative practices involving misrepresentation of identity and purpose nonetheless may be ethical.

Utah State Bar Ethics Advisory Opinion No. 96-04 (1996): “Recording conversations to which an attorney is a party without prior disclosure to the other parties is not unethical when the act, considered within the context of the circumstances, does not involve dishonesty, fraud, deceit or misrepresentation ... The act of taking notes during a conversation or dictating a memo to the file regarding a conversation should to be considered differently from actually recording it within the limitations discussed in this Opinion. One basis for allowing attorneys to record conversations is founded in the same reasoning stated in *[United States v.] White*, [401 U.S. 745, 753 (1971)] ‘An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent.’ An attorney’s ability to recall information from conversations is important to his competence in undertaking an action.... [A] number of issues that have arisen in other jurisdictions illustrate circumstances where the act of undisclosed recording of a conversation by an attorney would violate an ethical rule. For

example, it would be unethical for an attorney to fail to answer candidly if asked whether the conversation is being recorded.... A lawyer's failure to identify himself, the client, or the purpose of the conversation could also constitute unethical misrepresentation."

Vermont

In re PRB, 187 Vt. 35, 43, 989 A.2d 523, 528 (2009): Criminal defense attorneys interviewed and recorded the conversation of a potential witness. During the course of the telephone interview, the attorneys denied that the conversation was being recorded. The Vermont Supreme Court held that conduct violated Rule 4.1 of the Rules of Professional Conduct which prohibits attorneys from making false statements of material fact in the representation of a client. The Court concluded, however, that under the circumstances the attorneys did not violate Rule 8.4(c) which prohibits dishonest, fraudulent, and deceitful conduct, since it read the Rule to reach only such conduct that is "so egregious that it indicates that the lawyer charged lacks the moral character to practice law."

Virginia

Virginia State Bar Association Legal Ethics Opinion 1814 (2011): "In LEO 1765, the Committee extended LEO 1738's list of exceptions to include lawful use of non-consensual recording performed by federal lawyers as part of the federal government's intelligence work.... The Committee opines that when a Criminal Defense Lawyer or an agent acting under their supervision uses lawful methods, such as undisclosed tape-recording, as part of his/her interviewing witnesses or preparing his/her case, those methods cannot be seen as reflecting adversely on his/her fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).

"The committee further opines that when a Criminal Defense Lawyer or an agent acting under his/her supervision uses lawful methods, such as undisclosed tape-recording, as part of his/her interviewing witnesses or preparing his/her case, the lawyer or his/her agent must assure that the unrepresented third party is aware of the lawyer or agent's role."

Virginia State Bar Association Legal Ethics Opinion 1802 (2010): "In both of the above examples [clients seek advice on the secret use of records to gather evidence relating to sex abuse and hostile work environment], the Committee faces situations in which the client has asked the lawyer for his or her opinion on how to address the client's legal problem. The proposed undisclosed recording is not only lawful, but could very well be the only means by which the client may obtain relevant information. Nothing that the lawyer has suggested or recommended to the client violates the legal rights of the person whose statements are to be recorded.... The Committee believes that the circumstances presented in both examples are easily distinguishable from and stand in stark contrast to the illegal wiretapping case presented in Gunter. Both examples are situations that require the lawyer to weigh the competing ethical obligations of a lawyer's duties to third parties against those owed to the client.

Virginia State Bar Association Legal Ethics Opinion 1738 (2000): "[T]he ethics opinions issued by this committee to date do not recognize *any* circumstances that would allow an attorney to secretly tape record his or her conversations with another or direct another to do so. The committee concludes that its prior opinions sweep too broadly and therefore they are overruled to the extent they are inconsistent with this opinion.... [T]he committee is of the opinion that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations. The committee is further of the opinion that it is not improper for a lawyer

engaged in such an investigation to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful. Finally, the committee opines that it is not improper for a lawyer to record a conversation involving threatened or actual criminal activity when the lawyer is a victim of such threat.

“The Committee recognizes that there may be other factual situations in which the lawful recording of a telephone conversation by a lawyer, or his or her agent might be ethical. However, the committee expressly declines to extend this opinion beyond the facts cited therein and will reserve a decision on any similar conduct until an appropriate inquiry is made.”

LEO 1738 was written in the shadow of *Gunter v. Virginia State Bar*, 238 Va. 617, 385 S.E.2d 597 (1989). *Gunter*, noting ABA Formal Opinion 337, held “that ‘recording, by a lawyer or by his authorization, of conversations between third persons, *to which he is not a party*, without the consent or prior knowledge of each party to the conversation, is conduct involving dishonesty, fraud, [or] deceit under DR 1-102(A)(4).’ *Gunter v. Virginia State Bar* did not address whether it is unethical for an attorney to tape record a telephone conversation *in which the attorney is a participant*, if the other party to that conversation is unaware that it is being recorded,” LEO 1738, at 2-3 (emphasis in the original).

LEO 1738 also described its earlier opinions, “overruled to the extent they are inconsistent” with LEO 1738, *id.* at 3. LEO 1217 (1989), involving attorney’s surreptitious recording of a conversation of opposing counsel, “concluded that even though such a recording may be permissible under Virginia or federal law, it may nevertheless be improper under DR 1-102(A)(4) if there are additional facts which would make such recording dishonest, fraudulent, deceitful or a misrepresentation,” LEO 1738 at 2. Two subsequent opinions, LEO 1324 (1990) and LEO 1448, “concluded that even if non-consensual tape recordings are not illegal, a lawyer may not participate in such activity nor advise a client to do so,” LEO 1738 at 2. “Finally, the committee applied the holding LEO 1324 and LEO 1448 to prohibit an attorney acting only as an officer or agent of a corporation [rather than as an attorney] from tape recording a conversation between the attorney and a former employee of corporation with[out] the employee’s knowledge or consent. Legal Ethics Opinion 1635 (1995),” LEO 1738 at 2.

Washington

Recording telephone conversations is a crime under Washington law, WASH. REV. CODE ANN. §§9.73.030, 9.73.080. There are law enforcement exceptions, but there is no general one party consent exemption, WASH. REV. CODE ANN. §9.73.030. The Washington Rules of Professional Conduct declare that a lawyer “shall not ... commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” WASH. R. PROF. COND. 8.4(b).

Wisconsin

Wisconsin State Bar Professional Ethics Committee Formal Opinion E-94-5(1994): “The State Bar of Wisconsin Professional Ethics Committee believes that the Rules of Professional Conduct do not support a blanket interpretation that generally either permits or prohibits secret recording by lawyers of telephone conversations. Whether the secret recording of a telephone conversation by a lawyer involves ‘dishonesty, fraud, deceit or misrepresentation’ under SCR 20:8.4(c) depends upon all the circumstances operating at the time. This determination is highly

fact intensive and numerous factors are involved, including the prior relationship of the parties, statements made during the conversation, whether threatening or harassing prior calls have been made and the intended purpose of the recording. In this latter connection, it should be noted that section 968.31(2)(2) of the Wisconsin Statutes implicitly prohibits secret recordings ‘for the purposes of committing any criminal or tortious act . . . or for the purpose of committing any other injurious act.’ The secret recording of telephone conversations also may violate the Attorney’s Oath, which requires lawyers to ‘abstain from all offensive personality.’ SCR 20:8.4(g) and 40.15; Disc.Proc. Against Beaver, 181 Wis. 2d 12, 510 N.W.2d 129 (1994).

“Different standards apply when the other party involved is a client. The fiduciary duties owed by a lawyer to a client and the duty of communication under SCR 20:1.4 dictate that statements made by clients over the telephone not be recorded without advising the client and receiving consent to the recording after consultation. Similarly, the secret recording of telephone conversations with judges and their staffs is generally impermissible. Courts are responsible for determining when and how a record should be made of activities in the court. Moreover, the Attorney’s Oath requires lawyers to ‘maintain the respect due to courts of justice and judicial officers.’ SCR 20:8.4(g).

“Even in circumstances in which secret recording of telephone calls is permissible, lawyers should be very cautious in deciding whether to do so. In some circumstances, a recording of a telephone conversation may constitute material having potential evidentiary value that the attorney has an obligation to turn over to a prosecutor or opponent in litigation under SCR 20:3.4. In addition, the secret recording of telephone calls is offensive to many persons and may harm the attorney’s reputation when such conduct is discovered....

“Routinely recording of all calls would almost certainly violate the Rules of Professional Conduct.”

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